

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOHN POLITO and U.S. POSTAL SERVICE,
POST OFFICE, Kansas City, Mo.

*Docket No. 96-2430; Submitted on the Record;
Issued April 19, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
A. PETER KANJORSKI

The issues are: (1) whether appellant met his burden of proof to establish that he sustained stress-related conditions in the performance of duty; and (2) whether the refusal of the Office of Workers' Compensation Programs to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), constituted an abuse of discretion.

The Board finds that appellant did not meet his burden of proof to establish that he sustained stress-related conditions in the performance of duty.

Workers' compensation law does not apply to each and every injury or illness that is somehow related to an employee's employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers' compensation. Where the disability results from an employee's emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees' Compensation Act.¹ On the other hand, the disability is not covered where it results from such factors as an employee's fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.²

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.³ This burden includes the submission of a detailed

¹ 5 U.S.C. §§ 8101-8193.

² See *Thomas D. McEuen*, 41 ECAB 387 (1990), *reaff'd on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

³ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁴

In cases involving stress-related conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed factors of employment and may not be considered.⁵ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁶

In the present case, appellant alleged that he sustained stress-related conditions as a result of a number of employment incidents and conditions. He claimed that employment-related stress aggravated his hypertension, gastroesophageal reflux, peptic ulcer disease and gastritis conditions. By decision dated August 2, 1995, the Office denied appellant's claim on the grounds that he did not establish any compensable employment factors.⁷ The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant alleged that harassment and discrimination on the part of his supervisors and coworkers contributed to his claimed stress-related condition. He indicated that various supervisors and coworkers yelled at him, used ethnic slurs, lost his paychecks and threatened his job security. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors and coworkers are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁸ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.⁹ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated

⁴ *Effie O. Morris*, 44 ECAB 470, 473-74 (1993).

⁵ *See Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁶ *Id.*

⁷ By decision dated February 22, 1996, the Office denied modification of its August 2, 1995 decision and by decision dated June 25, 1996, the Office denied appellant's request for merit review.

⁸ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

⁹ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

against by his supervisors or coworkers.¹⁰ Appellant alleged that supervisors and coworkers made statements and engaged in actions which he believed constituted harassment and discrimination, but he provided no corroborating evidence, such as witness statements, to establish that the statements actually were made or that the actions actually occurred.¹¹ The record contains copies of grievances filed in connection with these claimed incidents of harassment and discrimination, but none of these grievances establishes the existence of such harassment or discrimination. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's allegations that the employing establishment wrongly denied leave and unreasonably monitored his activities at work, the Board finds that these allegations relate to administrative or personnel matters, unrelated to the employee's regular or specially assigned work duties and do not fall within the coverage of the Act.¹² Although the handling of leave requests and the monitoring of activities at work are generally related to the employment, they are administrative functions of the employer, and not duties of the employee.¹³ However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹⁴ Appellant did not submit evidence supporting his claims that the employing establishment committed error or abuse regarding denial of leave or monitoring of work activities. Thus, appellant has not established a compensable employment factor under the Act in this respect.

Appellant alleged that he developed stress because he feared losing his job due to the move towards privatization and consolidation by the employing establishment. The Board has previously held that a claimant's job insecurity, including fear of a reduction-in-force, is not a compensable factor of employment under the Act.¹⁵ Appellant indicated that he was on the "overtime list" because he had to earn extra money in case he was terminated from the employing establishment, but this circumstance would be related to his noncompensable concern regarding job security.¹⁶

¹⁰ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹¹ See *William P. George*, 43 ECAB 1159, 1167 (1992).

¹² See *Jimmy Gilbreath*, 44 ECAB 555, 558 (1993); *Apple Gate*, 41 ECAB 581, 588 (1990); *Joseph C. DeDonato*, 39 ECAB 1260, 1266-67 (1988).

¹³ *Id.*

¹⁴ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁵ See *Artice Dotson*, 42 ECAB 754, 758 (1990); *Allen C. Godfrey*, 37 ECAB 334, 337-38 (1986).

¹⁶ Moreover, the extent to which appellant worked overtime remains unclear from the record. Appellant indicated that he worked in an understaffed office, but he did not further articulate this claim.

Appellant alleged that he developed stress because he feared terrorist bombings, workplace violence, airplane crashes near his office, asbestos contamination and packages which leaked bodily fluids. The Board notes that appellant's claims with respect to these matters are vague and generalized. Appellant submitted numerous newspaper articles in support of his claim, but these articles do not show that he was actually subjected to such hazards such that they would be within the performance of duty. In the absence of such specific findings, appellant's dissatisfaction with working in an environment which is considered to be undesirable constitutes frustration from not being permitted to work in a particular environment or to hold a particular position and is not compensable under the Act.¹⁷

For the foregoing reasons, appellant has not established any compensable employment factors under the Act and, therefore, has not met his burden of proof in establishing that he sustained stress-related conditions in the performance of duty.¹⁸

The Board further finds that the refusal of the Office to reopen appellant's case for further consideration of the merits of his claim, pursuant to 5 U.S.C. § 8128(a), did not constitute an abuse of discretion.

To require the Office to reopen a case for merit review under section 8128(a) of the Act,¹⁹ the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.²⁰ To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.²¹ When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.²²

In support of his March 1996 reconsideration request, appellant submitted a statement in which he detailed the incidents and conditions at work which he felt aggravated his medical conditions. This statement was substantially similar to previous statements considered by the Office and the Board has held that the submission of evidence which repeats or duplicates evidence already in the case record does not constitute a basis for reopening a case.²³

¹⁷ See *David M. Furey*, 44 ECAB 302, 305-06 (1992).

¹⁸ As appellant has not established any compensable employment factors, the Board need not consider the medical evidence of record; see *Margaret S. Krzycki*, 43 ECAB 496, 502-03 (1992).

¹⁹ Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

²⁰ 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

²¹ 20 C.F.R. § 10.138(b)(2).

²² *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

²³ *Eugene F. Butler*, 36 ECAB 393, 398 (1984); *Jerome Ginsberg*, 32 ECAB 31, 33 (1980).

In the present case, appellant has not established that the Office abused its discretion in its June 25, 1996 decision by denying his request for a review on the merits of its August 2, 1995 and February 22, 1996 decisions under section 8128(a) of the Act, because he has failed to show that the Office erroneously applied or interpreted a point of law, that he advanced a point of law or a fact not previously considered by the Office, or that he submitted relevant and pertinent evidence not previously considered by the Office.

The decisions of the Office of Workers' Compensation Programs dated June 25 and February 22, 1996 are affirmed.

Dated, Washington, D.C.
April 19, 1999

Michael J. Walsh
Chairman

Willie T.C. Thomas
Alternate Member

A. Peter Kanjorski
Alternate Member